No. 80-1098

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ORANGE COUNTY, NEW YORK, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION


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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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1. At all times relevant to this case, petitioner Orange County, New York, was a "prime sponsor" (see 29 U.S.C. 812) charged with responsibility for administering local employment and training programs under the Comprehensive Employment and Training Act of 1973 ("CETA"), 29 U.S.C. 801 *et seq.* On September 15, 1975, the county's probation department hired Janet Allard as a CETA Title VI public service employee. At the time of her hiring, Janet Allard was married to Louis Allard, a director of data processing for the county. Mr. Allard managed and supervised the work of about forty people, including such employees as key-punch operators, programmers, and systems analysts, some of whom were CETA employees (Pet. App. 23). Mrs. Allard's employment with the county ended on May 5, 1978 (*id.* at 23-24).

The Secretary of Labor determined that, in hiring Mrs. Allard, petitioner had violated a regulation prohibiting a

grantee such as petitioner from hiring anyone in "a public service employment position funded under the Act if a member of his or her immediate family is engaged in an administrative capacity for the same grantee * * * ." 29 C.F.R. 98.22. In October 1978, the Secretary advised petitioner of the violation and of the Department of Labor's intent to seek reimbursement, pursuant to 29 U.S.C. 818(d), of the $20,760.41 paid from CETA funds for Mrs. Allard's wages and fringe benefits (Pet. App. 20-22).

After a hearing, an administrative law judge concluded that petitioner had violated the anti-nepotism regulation (Pet. App. 19-29). The ALJ declined to rule on petitioner's claim that the regulation violated Mrs. Allard's rights to due process and equal protection, holding that such questions should be decided by the courts, not by the administrative agency (*id.* at 26-27).

On review, the court of appeals affirmed the Secretary's finding that petitioner had violated the anti-nepotism regulation (Pet. App. 16-18). The court held that the Secretary "clearly" had the authority, under 29 U.S.C. 801, to establish standards to ensure against program abuses such as nepotism (Pet. App. 17). It noted that Congress specifically provided for such a regulation in subsequently enacting 29 U.S.C. (Supp. II) 825(g), and concluded that the regulation "obviously was designed to avoid problems which congress foresaw in the administration of the CETA program" (Pet. App. 17). The court also held that petitioner lacked standing to assert the constitutional claims of CETA grant beneficiaries, and that, in any event, no colorable constitutional claims had been presented (*id.* at 18).

2. The arguments raised by petitioner are insubstantial and do not warrant this Court's review. Contrary to petitioner's contention (Pet. 11-13), the court of appeals correctly held that petitioner lacks standing to assert the constitutional rights of past or potential CETA position applicants

whose immediate family members work for the county in an administrative capacity.

The question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). See *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976). In determining whether a plaintiff has met the case or controversy requirement of Article III, "the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Here, the fact that the county has been ordered to reimburse the government for federal funds expended in violation of a federal regulation ensures that the county has a sufficiently concrete interest in the action to invoke federal court jurisdiction.

However, that is not the end of the inquiry. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, *supra*, 422 U.S. at 499. See *Singleton* v. *Wulff*, *supra*, 428 U.S. at 113-114 (plurality opinion); *id.* at 123-125 (opinion of Powell, J.). The general rule that a litigant may not challenge governmental action on the ground that it infringes the rights of some third party stems from principles of judicial restraint and self-governance. In this case, petitioner bases its claim solely on the legal rights of third parties, *i.e.*, the constitutional rights of certain CETA recipients or applicants. But petitioner has failed to demonstrate why it should be permitted, contrary to prudential standing limitations, to assert constitutional claims on behalf of third parties. The county has not asserted that its relationship with the third parties is such that it is as effective a proponent of the rights

claimed as the third parties themselves, nor are the third parties unable to assert their own rights. See *Singleton* v. *Wulff, supra,* 428 U.S. at 114-116 (plurality opinion).[1] In short, there is no justification for allowing petitioner to seek relief based on the rights of third parties. See *Warth* v. *Seldin, supra,* 422 U.S. at 509-510; *Friedman* v. *Harold,* No. 80-1050 (1st Cir. Jan. 13, 1981).[2]

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[1]CETA recipients and applicants are not precluded from challenging the Secretary's implementation of the regulations at issue here. Under 29 U.S.C. (Supp. II) 817(a), a CETA recipient or any interested person dissatisfied with or aggrieved by any final action of the Secretary terminating or suspending financial assistance or ordering repayment of misspent funds may file a petition for review of the Secretary's action in the court of appeals.

[2]In any event, the court of appeals correctly held (Pet. App. 18) that the constitutional claims that petitioner wishes to assert on behalf of third-party CETA recipients or applicants are without merit. To begin with, no fundamental right to liberty or property is implicated here, since Congress' creation of a program providing subsidized employment opportunities did not vest any particular individual with a right to a CETA job. See *Maloney* v. *Sheehan,* 453 F. Supp. 1131, 1138 (D. Conn. 1978); see also *Cervoni* v. *Secretary of H.E.W.,* 581 F. 2d 1010, 1018 (1st Cir. 1978). Moreover, persons barred from some CETA jobs by the instant regulation are not prevented from pursuing their professions or occupations, either in the public or private sectors, so as to give rise to a colorable due process claim. *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 895-896, 898 (1961).

Finally, the classification embodied in the regulation is rationally related to a legitimate governmental interest. See *United States Railroad Retirement Board* v. *Fritz,* No. 79-870 (Dec. 9, 1980). CETA was enacted in 1973 "to provide job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons" (29 U.S.C. 801). The anti-nepotism regulation is designed to ensure that selection for CETA positions will be based only on an applicant's qualifications and need, and not on considerations of favoritism. The challenged regulation is reasonably related to the legitimate concern of avoiding nepotism abuses in the CETA program.